IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 513

BURNHAM CHEMICAL COMPANY,
Petitioner,

v.

BORAX CONSOLIDATED, LTD., PACIFIC COAST BORAX COMPANY, UNITED STATES BORAX COMPANY AND AMERICAN POTASH & CHEMICAL CORPORATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR AMERICAN POTASH & CHEMICAL CORPORATION IN OPPOSITION

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Opinions Below

The opinion of the Court of Appeals is reported at 170 F. (2d) 569. The oral opinion of the District Court is in the record at pages 800-806.

Jurisdiction

The judgment of the Court of Appeals was entered on October 27, 1948. The petition for writ of certiorari was filed on January 17, 1949. The jurisdiction of this Court is invoked under Title 28, U. S. Code, Section 1254.

Questions Presented

The petition does not present any clear-cut questions for consideration. The District Court held, and the Court of Appeals affirmed

1. that this is an action for treble damages under Section 4 of the Clayton Act, (15 U. S. C. Section 15);

2. that such an action is an action at law and not one in equity;

3. that state statutes of limitations are applicable to such actions;

4. that the applicable statute of limitations in this case is California Code of Civil Procedure Section 338(1);

5. that there was no evidence of fraudulent concealment which tolled the statute of limitations.

The first four rulings were based upon an unbroken line of decisions of this and other federal courts. In an effort to obtain review by this Court, petitioner alleges a nonexistent conflict in authorities. Under The Questions Presented, petitioner states two "broad questions" which it purports to break down into two "narrower questions" (Pet. 7). It then states a third point but does not advise the Court whether it is seeking review of the Court's ruling in that regard (Pet. 8). Then again, in its brief it claims numerous errors by the court below which it states it will pass over (Pet. 14).

Although the petition does not make clear exactly what rule it asks of this Court, its argument may be considered as requesting one or all of the following:

(1) a ruling that treble damage actions under Section 4 of the Clayton Act are subject to no specific statute of limitations but are governed by the equitable doctrine of laches;

(2) rather than have this type of action subject to varying periods of limitations in the forty-eight states, this Court legislate a federal statute of limitations for private antitrust cases, or for all federally-created rights;

(3) that when a private action under Section 4 of the Clayton Act has been fraudulently concealed from the plaintiff, the period of limitation does not commence to run on the date the damage occurred, but only after discovery by the plaintiff of his cause of action, or of the evidence necessary for the successful prosecution thereof.

Statutes Involved

Section 4 of the Clayton Act (15 U. S. C. Section 15):

> "§ 15. *Suits by persons injured; amount of recovery*
>
> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

The California Code of Civil Procedure, Sections 335 and 338:

Sec. 335:

> "The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:"

Sec. 338:

> "Within three years: 1. An action upon a liability created by statute, other than a penalty or forfeiture."

Statement

A. The Issue Decided by the District Court

The petitioner commenced this action in July, 1945 in the District Court for the Northern District of California. The complaint alleged a violation of the antitrust laws by the respondents resulting in damage to the petitioner, which it requested be trebled. The acts of damage alleged occurred not later than 1929, more than 16½ years before the suit was commenced.

In an effort to avoid the bar of the applicable California three-year statute of limitations, Section 338(1) of the California Code of Civil Procedure, petitioner contended in the District Court (1) that a conspiracy to violate the antitrust laws constitutes a "fraud" and an action for damages is not barred until the injured party "discovers" the fraud, or (2) that whether or not the conspiracy constitutes a "fraud" it was "fraudulently concealed" from the petitioner, and that the three-year statute of limitations would not begin to run until discovery.

The issue of the statute of limitations was considered by the District Court at a separate trial based upon a special answer (R. 226, 254-257). The District Court held that petitioner had knowledge of its cause of action many years before it commenced action, that there was no fraudulent concealment, and that the three-year statute of limitations was applicable (R. 803-4).

B. Erroneous and Unsupported Assertions in the Petition

The petitioner singularly avoids record citations, which was not an oversight but due to the lack of any basis in the record for almost all of the statements made. It also seeks to have this Court believe that none of the allegations of the complaint were denied (Pet. 2, 4), while the fact is that the issue before the Court was presented in a preliminary proceeding. No answer on the merits was ever required.

In addition to attempting to create some legal issues which might attract this Court's attention, the petition contains a great deal of colorful but unsupported allegations with respect to this respondent which, petitioner hopes, will create an atmosphere to make up for the lack of issues. The allegation that this respondent, a corporation, was formerly owned and controlled by citizens of the Third Reich (Pet. 2) is entirely irrelevant. The petition also alleges the Antitrust Division of the Department of Justice discovered evidence of the "secret conspiracy" in the files of this respondent only after it was brought under the control of the Alien Property Custodian (Pet. 2). This statement is unsupported by either the pleadings or evidence.

The brief filed by other respondents, Borax Consolidated, Limited, et al., sets forth the nature of the issue presented in the District Court, evidence presented and the

court's decision. To avoid needless repetition, this respondent will not repeat the statements made in that brief.

ARGUMENT

Summary

The petition requests this Court to make new law in an area which rightfully belongs to Congress. The petition asks this Court to legislate a federal statute of limitations in private suits for damages under the antitrust laws in place of the state statutes which were ruled applicable by this Court in 1906 in *Chattanooga Foundry & Pipe Works* v. *City of Atlanta,* 203 U. S. 390, and by a long line of decisions which have followed the *Chattanooga* case without deviation. The justification which the petitioner urges for such judicial legislation is that the "rigid" enforcement of state statutes of limitations should be modified, but the petitioner does not point out how the statutes could conceivably be applied in any other way.

Although the petition is not clear, it appears to argue in the alternative that, in the absence of a federal statute of limitations, the rule should be that state statutes of limitations are tolled where there is a "fraudulent concealment" of the claim for relief by the defendants (Pet. 7). On the record in this case, however, this contention is completely academic as the principal issue decided by the District Court and upheld by the Court of Appeals was this very question of "fraudulent concealment". Upon the face of the complaint the action would have been barred by a "rigid" application of the three-year California statute of limitations

but the District Court granted the request of petitioner for a special trial on the issue of fraudulent concealment. After a full hearing, at which petitioner offered all the evidence it could produce, the court found as a fact that there had been no fraudulent concealment (R. 803-804).

I

This Court Has No Authority to Legislate a Federal Statute of Limitations for Private Actions Under the Antitrust Laws.

The petitioner argues that federally-created rights are not or ought not to be controlled by state statutes of limitations. However, it has always been the rule that federally-created statutory rights for which the remedy is not penal or equitable are subject to state statutes of limitation, unless, in the statute creating the right, there is an express provision limiting the time during which the action may be brought. *Chattanooga Foundry & Pipe Works* v. *City of Atlanta, supra.* This leading authority was cited with approval by this Court in *Holmberg* v. *Armbrecht,* 327 U. S. 392, 395 (1946) the case which petitioner urges is in conflict with the holding of the court below. Congress has recognized the applicability of state statutes of limitations to private antitrust actions by providing for their suspension during the pendency of suits by the Government (15 U. S. C. § 16).

The petition concedes that the antitrust laws contain no federal statute of limitations, either in express language or by implication (Pet. 16). An answer to the contention of petitioner that there should be no statute of limitations in antitrust cases is stated in *Campbell* v. *City of Haverhill,*

155 U. S. 610 (1895) where a plaintiff took the position that the application of state limitations would defeat the policy of federally-created statutory rights:

> "* * * In a country within which not even treason can be prosecuted after the lapse of three years, it can scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture" (p. 616-17).
>
> * * * * *
>
> The truth is that statutes of limitations affect the remedy only, and do not impair the right, and that the settled policy of Congress has been to permit rights created by its statutes to be enforced in the manner and subject to the limitations prescribed by the laws of the several states" (p. 618).

The inapplicability of the rule of *Holmberg* v. *Armbrecht, supra,* to this type of action is demonstrated in *Cope* v. *Anderson,* 331 U. S. 461, 463-4, (1947) in which Mr. Justice Black said:

> "There is no federal statute of limitations fixing the period within which suits must be brought to enforce the [federal] statutory double liability of shareholders of insolvent national banks. For this reason we look to Ohio and Pennsylvania law to determine the period in which these suits may be brought. McDonald v. Thompson, 184 U. S. 71, 46 L ed 437, 22 S Ct 297; McClaine v. Rankin, 197 US 154, 158, 49 L ed 702, 704, 25 S Ct 410, 3 Ann Cas 500; Rawlings v. Ray, 312 US 96, 97, 85 L ed 605, 607, 61 S Ct 473. Even though these suits are in equity, the states' statutes of limitations apply. For it is only the scope of the relief sought and the multitude of parties sued which give equity concur-

rent jurisdiction to enforce the legal obligation here asserted. And equity will withhold its relief in such a case where the applicable statute of limitations would bar the concurrent legal remedy" [Citing, *inter alia, Holmberg* v. *Armbrecht, supra*].

The contention of petitioner that state statutes of limitations do not well serve the purpose of federal legislation is completely refuted by recognition of the application of such statutes to many federally-created rights, such as

Fair Labor Standards Act of 1938 [29 U. S. C. §§ 201 et seq.]. (Prior to recent enactment by Congress of federal statute of limitations). Right to sue for overtime compensation.

Reid v. *Solar Corporation,* 69 F. Supp. 626, 629 (D. C. N. D. Iowa 1946);

Abram v. *San Joaquin Cotton Oil Co.,* 46 F. Supp. 969, 975 (D. C. S. D. Calif. 1942);

Loggins v. *Steel Const. Co.,* 129 F. (2d) 118, 121 (C. A. 5, 1942);

Asselta v. *149 Madison Avenue Corporation,* 65 F. Supp. 385, 388 (D. C. S. D. N. Y., 1945) aff'd 156 F. (2d) 139 (C. A. 2, 1946); aff'd 331 U. S. 199 (1947).

Interstate Commerce Act [49 U. S. C. §§ 1 et seq.]. (Prior to enactment by Congress in 1906 of federal statute of limitations). Right to recover in cases of discriminatory freight rates.

Ratican v. *Terminal R. Ass'n,* 114 Fed. 666 (D. C. Mo. 1902);

Patent Infringement.

Campbell v. *City of Haverhill, supra.*

Merchant Marine Act [46 U. S. C. § 596]. Right of seamen to recover wages doubled.

Buckley v. *Oceanic S. S. Co.,* 5 F. (2d) 545, 546 (C. A. 9, 1925) (rehearing denied);

National Bank Act [12 U. S. C. §§ 63, 64]. Double liability of shareholders.

McDonald v. *Thompson,* 184 U. S. 71 (1902); *Cope* v. *Anderson, supra.*

Safety Appliance Act [45 U. S. C. § 1 et seq.]. Action for statutory negligence.

Nichols v. *Chesapeake & O. Ry. Co.,* 195 Fed. 913, 916 (C. A. 6, 1912).

Copyright Law [17 U. S. C. § 1]. Right to recover treble royalties.

Brady v. *Daly,* 175 U. S. 148, 158 (1899).

The petitioner seeks to distinguish private suits under the antitrust laws from all of these other federally-created rights by claiming for the former special importance in antitrust law enforcement. There is no more basis for holding that the public interest requires a uniform statute of limitations in private suits under the antitrust law than for any of these other federally-created rights. The petitioner over-emphasizes the function of private suits, as the primary responsibility for enforcing the antitrust laws is upon the Department of Justice and the Federal Trade Commission, which are vigorously prosecuting suits in every industry in the country.

Even if there were an argument in favor of the policy of having a federal statute of limitations for private actions for violations of the antitrust laws, Congress is the only authority for determining this policy. Where Congress intends to provide uniform limitations on the bringing of an action created by federal statute, it does so, as in the Securities Act (15 U. S. C. § 77m), the Federal Employees' Liability Act (45 U. S. C. § 56) and the Federal Communications Act (47 U. S. C. § 415).

In addition to these instances where Congress has included a statute of limitations in the original statute creating the right, Congress has enacted a federal statute of limitations in other cases where it concluded that state statutes of limitations should no longer apply to a federally-created right. In 1906 the Interstate Commerce Act was amended so as to provide for a federal statute of limitations to take the place of the previously applicable state statutes [34 Stat. 584, c. 359; *Meeker* v. *Lehigh Valley R. Co.*, 236 U. S. 412, 423 (1915)] and in 1947 a federal statute of limitations was enacted by Congress covering rights of action under the Fair Labor Standards Act, which had previously been limited by state statutes of limitations (61 Stat. 87, c. 52, 29 U. S. C. § 255).

II

The Contention That the Courts Below Failed to Give the Petitioner the Benefit of the Rule of Fraudulent Concealment Is Unfounded.

The second question relates to petitioner's argument that fraudulent concealment of a conspiracy in restraint of trade should toll the state statute of limitations. Whether or not the doctrine of fraudulent concealment is applicable in general to private antitrust actions the District Court did

apply the doctrine under California law in this case. Even though the complaint did not adequately plead fraud or fraudulent concealment, the court granted a special trial before a jury on the question of whether petitioner knew or had reason to know the facts which it now contends were fraudulently concealed from it. At the trial the court found as a fact that there had been no fraudulent concealment.

Although petitioner argues at length that the court below ruled that this statute of limitations cannot be tolled for "fraudulent concealment" (Pet. 7, 9, 14), it concedes "The court below held, in effect, that the statute of limitations began to run when the petitioner *knew or had good cause to believe* that it had been injured by the unlawful conduct of the respondents" (Pet. 15) (italics supplied). It appears, therefore, that the crux of petitioner's argument is not that its cause of action was concealed, but only a piece of *evidence,* the alleged secret agreement.

The cases cited by petitioner as in conflict with the holding of the court below, *American Tobacco Co.* v. *People's Tobacco Co.,* 204 Fed. 58 (C. A. 5, 1913) and *Bailey* v. *Glover,* 21 Wall. 342 (1875) do not aid petitioner. In the *People's Tobacco Co.* case the court held the question was whether the plaintiff "knew, or ought to have known * * * that he had suffered an actionable injury" (p. 61). The effect of *Bailey* v. *Glover* was to toll the statute until discovery of the cause of action. The court below found that the petitioner did in fact have knowledge of its cause of action ever since 1928. The issue as tried gave petitioner the benefit of every principle for which it now contends except abolition of all limitations on private antitrust actions. In 1939 petitioner gave to the Antitrust Division information relating to the alleged violations (R. 398-401,

623-624) yet it continued to "sleep on its rights" until after the Government's suit was instituted in 1944. Private plaintiffs are not entitled to delay commencing suit in the hope of obtaining a free ride upon additional evidence gathered by the Government.

CONCLUSION

It is submitted that the petition presents no question which warrants consideration by this Court. The claimed conflict between the judgment of the court below and decisions of this Court and the Fifth Circuit is non-existent. The only "court-made law" which this Court might consider would be the application of the doctrine of fraudulent concealment. But the necessity for reviewing this doctrine is not presented by the record in this case as the court below did apply it and found as a fact upon the evidence that there was no fraudulent concealment. This finding of fact by the District Court, specifically affirmed on appeal, is not reviewable by this Court. The further request for judicial legislation creating a federal statute of limitations, or a ruling that no statute of limitations is applicable, is not a proper subject for judical action.

It is respectfully submitted that the petition should be denied.

Dated: February, 1949.

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